No. 21,786

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F.J. BUCKNER CORPORATION, d/b/a
UNITED ENGINEERING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND CROSS-PETITION FOR
ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Cases:

Cases: (Continued) Page

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JURISDICTION

This case is before the Court upon petition of F.J. Buckner Corporation, d/b/a United Engineering Company (hereafter "petitioner" or "Company"), to review and set aside, and on cross-petition by the National Labor Relations Board to enforce, an order of the Board reported at 163 NLRB No. 7. The order, which issued on April 20, 1967, followed proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.) The Company maintains its principal place of business within this judicial circuit in Compton, California, and this Court has jurisdiction of the proceeding under Section 10(e) of the Act.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(3) and

because he engaged in activities protected by Section 7 of the Act. (R. 23-24).[1/]

Petitioner employs about 200 individuals (R. 13; Tr. 52) and performs maintenance services for oil and chemical companies (R. 12-13; Tr. 234). Szczesniak worked for petitioner as a laborer and mechanic's helper from May 1956 until March 20, 1965 (R. 13; Tr. 118). During 1964 and 1965 Szczesniak held a number of positions with the Union,[2/] including unit chairman, negotiating committee chairman, member of the negotiating committee, member of the policy board, and steward (ibid.).

The duties of the steward were, as Szczesniak explained, "to see that there was a correct interpretation and application of the contract; to assist men in problems or any grievances they might have; and to investigate . . . /grievances/ to see if there were any basis for them" (Tr. 119). In fulfilling these obligations, Szczesniak had frequent conversations with Leonard Loy, petitioner's plant manager (R. 14; Tr. 23, 255), about the employees' complaints (R. 14; Tr. 170-171, 275-279). Indeed, in the Company's opinion, the steward did his job too conscientiously. Thus, at a bargaining meeting to negotiate a new contract held in early 1965, F.J. Buckner, petitioner's president

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1/ References designated "R" are to Volume I of the record reproduced according to Rule 10 of the Rules of this Court. "Tr." references are to the reporter's transcript of testimony reproduced in Volume II of the record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2/ Oil, Chemical, and Atomic Workers International Union, Local 1-128, AFL-CIO, Long Beach Local No. 1-128, OCAWIU, AFL-CIO.

(R. 13; Tr. 22), complained to Szczesniak that the Company was being harassed with grievances and that he "intended to put a stop to it" (R. 14; Tr. 42). Further, Buckner accused Szczesniak of "going around the plant and going to people's homes at nights" (R. 14; Tr. 238) and requesting the employees to file grievances "where grievances actually did not exist" (R. 14; Tr. 43).[3/]

The 1965 contract negotiations resulted in a new agreement effective March 3, 1965, providing, inter alia, that grievances shall be submitted "in written form" (G.C. Exh. 2, p. 4 Article VII, para. 1).[4/] Between March 3 and 19, Szczesniak had several meetings with Loy in which the employee sought information to determine whether certain employee complaints warranted the filing of written grievances (R. 13,

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3/ Szczesniak gave uncontradicted testimony that he never solicited a employee to file a grievance, and both Buckner and Loy admitted that they had no first-hand knowledge to support their accusation (Tr. 173, 250, 281).

4/ The agreement also provided, for the first time, that the Union stewards "when requested by an employee may assist said employee in discussing with supervision any question pertaining to working conditions including the processing of a grievance. Such discussion will be at such time and place as not to interfere with efficient maintenance of the work. The Steward must secure permission from his Foreman to leave his work assignment and must report back to his Foreman upon returning to his work. Stewards will act in such a manner as to take the minimum time away from their work" (G.C. Exh. 2, p. 4, Article III).

n. 4, R. 15, n. 7; Tr. 120-129, 172).[5/] Buckner, however, accused Szczesniak of still filing grievances in verbal form and stated that the Company was "sick and tired of it" (Tr. 243).

On March 18, Szczesniak, who had previously been rebuked for being absent without notifying the Company (Tr. 237, 269-270), did not appear for his job on the night shift (Tr. 270-271). Loy, who had not been advised by Szczesniak that he would be absent, telephoned Buckner and informed him of what had occurred (Tr. 271). The next day, March 19, Buckner decided to discharge Szczesniak (Tr. 24-25, 274). While this decision was based in part on the fact that Szczesniak had once again been absent without calling in, Buckner testified that his decision was also motivated in part by the manner in which Szczesniak solicited and pressed grievances (Tr. 34-35, 42-43, 53-54, 56). Buckner believed that Szczesniak was soliciting unmeritorious grievances from employees at their homes and on the job, and that he was interfering with the work of office personnel in presenting them (Tr. 42-43, 49, 238).

After deciding to discharge Szczesniak, Buckner called a Mr. Thornberry, the Union's International Representative, and told him Szcezesniak was being discharged because of too many unexplained absences (Tr. 244-245). Thornberry approved of the action

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5/ For example, on the 16th, Szczesniak informed Loy that the men were complaining about the Company's rehiring practices and he inquired if petitioner "was adhering to . . . the preferential hiring list as per our contract" (Tr. 122). And on March 19th, Szczesniak requested that Loy check the time cards of two employees who had complained they had received only "laborers' pay for doing helpers' work" (Tr. 128).

(Tr. 245). Buckner then called Loy and told him to fire Szczesniak (Tr. 24-25, 274). The next day, March 20, Loy discharged the employee, telling him that he was being terminated for "absenteeism without valid excuses or reasons and that his methods of bringing grievances were also in it" (Tr. 275).

On March 25, Szczesniak filed a grievance alleging that the discharge was unjustified and in violation of the contract (R. 14; Tr. 168, Resp. Exh. 1). On April 2, two members of the three-man Workmen's Committee were called in by Loy to discuss the discharge (R. 14; Tr. 111, 206, 213-216, 221-222, 223-225). Neither the Union's staff representative, whom the contract requires also be present when the employer meets with the Workmen's Committee under the grievance procedure, nor the grievant himself, was notified of the meeting or present at it (R. 14; Tr. 85-87, 222, 225, 232, 292).[6/] After a short

6/ The grievance procedure established by the contract states, in relevant part (G.C. Exh. 2, pp. 4-5):

"Employees of the Union shall have the right to present grievances involving the interpretation and application of this Agreement and any dispute arising hereunder. Such disputes or grievances shall be handled in the following manner:

1. The employee and/or a Steward shall take the matter up in written form with the designated representative of the Company on the job site where the grievance occurs, within five (5) working days, after his knowledge of the incident which cause the grievance.

2. The Company will give its written answer within five (5) working days, then the Union and the committee shall meet

(Continued)

discussion, in which Szczesniak's absences and grievance activities were mentioned, the two committeemen agreed that the Company had good and sufficient cause to terminate Szczesniak (R. 14; Tr. 222-225, 231, 232, Resp. Exhs. 5, 6). Two to four weeks later, James Walker, the Union's staff representative, spoke to Buckner and Loy about Szczesniak's discharge (Tr. 64). They told him the employee had been terminated because of his absences and because "he had been agitating the employees on the job; that he had been going to people's homes and soliciting grievances; and he also mentioned the problem that they had where Mr. Szczesniak had asked some laborers why they didn't get a helper's job in the insulation department; and anyway, because of this, Mr. Loy said that they had lost that work" (Tr. 65). Walker subsequently called Buckner and told him the Union wanted to submit Szczesniak's discharge to arbitration (R. 14; Tr. 93-95). Buckner, however, refused on the ground that the matter was closed because the Workmen's Committee had agreed with the Company (ibid.). Walker replied that the matter was not settled as far as the Union was concerned, but nothing further was done to compel the Company to submit the matter to arbitration (Tr. 95).

6/ (Continued) with the Company within five (5) working days in an effort to resolve the dispute.

3. * * *

4. If the dispute is not settled in Step No. 2 above, the matter shall be reviewed by a representative of the Union and Company within five (5) days who shall, failing to settle the grievance between themselves, refer the dispute to the American Arbitration Association in writing within ten (10) days to be timely, for adjudication . . . ."

II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing, the Board, in agreement with the Trial Examiner, found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging Szczesniak, in significant part, because of his role in handling and processing employee grievances, an activity protected by Section 7 of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found or in any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate Szczesniak and compensate him for any monetary loss suffered, and to post appropriate notices.

ARGUMENT

I. INTRODUCTION

Before this Court, the Company does not challenge the Board's finding that Szczesniak's discharge was motivated in significant part by his role in handling and processing grievances under the collective bargaining agreement. Indeed, as shown in the counterstatement of the case, Buckner and Loy admitted as much at the hearing. Nor does the Company challenge the Board's conclusion that a discharge so motivated violated Section 8(a)(3) and (1) of the Act. This proposition is settled law. See, e.g., Shattuck Denn Mining Corp. v. N.L.R.B., 362 F. 2d 466, 467-470 (C.A. 9); Hawkins v. N.L.R.B., 358 F. 2d 281 (C.A. 7); N.L.R.B. v. Thor Power Tool Co., 351 F. 2d 584 (C.A. 7); N.L.R.B. v. Symons Mfg. Co., 328 F. 2d 835 (C.A. 7); N.L.R.B. v. Bowman Transportation, Inc., 314 F. 2d 497 (C.A. 5). Cf., Morrison-Knudsen Co. v. N.L.R.B., 358 F. 2d 411 (C.A. 9); N.L.R.B. v. Western Meat Packers, Inc., 368 F. 2d

65, 68, 70-71(C.A. 10); Socony Mobil Oil Co. v. N.L.R.B., 357 F. 2d 662 (C.A. 2).[7/] Rather, the Company raises a number of procedural defenses upon which it seeks to prevail without regard to the merits of the case. We submit, however, that the arguments asserted by petitioner here are without substance, and that the Board is entitled to have its order enforced in full.

II. THE BOARD PROPERLY DECLINED TO DEFER TO THE ALLEGED PRIVATE SETTLEMENT OF SZCZESNIAK'S GRIEVANCE

Petitioner argues (Br. pp. 6-11) that the Board was deprived of jurisdiction to entertain the instant unfair labor practice charge -- or at least abused its discretion in doing so -- because the grievance which Szczesniak filed over his discharge was allegedly settled between the Company and the Union at Step 2 of the contractual grievance procedure. However, Section 10(a) of the Act states that the Board's power to remedy and prevent unfair labor practices is unaffected "by any means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." It is well settled that, by virtue of this provision, "agreements between private parties cannot

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7/ It is immaterial that Szczesniak's discharge was also partly motivated by reasons unrelated to his protected activity, so long as one motive was for an illegal object. Socony Mobil Oil Co. v. N.L.R.B., supra, 357 F. 2d at 663; N.L.R.B. v. Barberton Plastics Products, Inc., 354 F. 2d 66, 68 (C.A. 6); N.L.R.B. v. D'Armigene, Inc., 353 F. 2d 406, 409 (C.A. 2); N.L.R.B. v. Great Eastern Color Lithographic Corp., 309 F. 2d 352, 355 (C.A. 2), cert. denied 373 U.S. 950.

estrict the jurisdiction of the Board. . . ./T/he Board may exercise ts jurisdiction in any case of an unfair labor practice when in its iscretion its interference is necessary to protect the public rights efined in the Act." N.L.R.B. v. Walt Disney Production, 146 F. 2d 44, 48, (C.A. 9), cert. denied 324 U.S. 877. Accord: N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 436; Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-271; N.L.R.B. v. Tanner Motor Livery, Ltd., 349 F. 2d 1, (C.A. 9); N.L.R.B. v. Auburn Rubber Co., Inc., -- F. 2d -- (C.A. 10), 56 LRRM 2129, 2130; N.L.R.B. v. Thor Power Tool Co., 351 F. 2d 584, 587 (C.A. 7); Lodge 743, IAM v. United Aircraft Corp., 337 F. 2d 5, 8-9 (C.A. 2), and cases cited therein, cert. denied 380 U.S. 908.[8/] Thus, the alleged settlement of Szczesniak's grievance between the company and the union did not, as a matter of law, deprive the Board of jurisdiction in this case.

It is true that, in the exercise of its discretion, the Board has adopted the policy of giving "hospitable acceptance to the

8/ In its brief, p. 8, petitioner asserts that "individual rights of an employee may be bargained away by the bargaining agent of that employer /sic/." While that proposition might be true with regard to rights arising under a collective bargaining agreement, no court has held that a union may bargain away the statutory right of the employees it represents to be free of conduct violative of Section 8(a)(1),(2),(3) and (4) of the National Labor Relations Act. See Lodge 743, IAM v. United Aircraft Corp., supra, 337 F. 2d at 10.

the arbitral process," by "voluntarily withold/ing/ its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." International Harvester Co., 138 NLRB 923, 927, aff'd sub nom. Ramsey v. N.L.R.B., 327 F. 2d 784 (C.A. 7), cert. denied 377 U.S. 1003, cited and quoted with approval in Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-271. This policy, however, is clearly inapplicable here for the simple reason that there was no arbitration. There was no determination of the validity of Szczesniak's discharge by an impartial third party -- or even by a viable bipartite panel 9/ -- after a full hearing in which the dischargee was given an opportunity to present his case and challenge the employer's. There was no confrontation between the accuser and the accused, no examination and cross-examination, no calling of witnesses -- in short, nothing to assure that all the relevant facts were brought out and made available for consideration by a fair-minded bench.

Rather, so far as the record shows, there was merely a meeting between the Company and two members of the Workmen's Committee, at which the employer's representative prevailed upon the two employees to agree that the grievant was discharged for cause. Szczesniak did not know of the meeting and so was not there, and the record is barren of any details about what went on. Even assuming that this was a

9/ See Roadway Express, Inc., 145 NLRB 513, 514-515.

properly conducted meeting under Step 2 of the grievance procedure,[10/] it hardly satisfies the Board's requirements of procedural fairness which would warrant deference to the result. As the Board said with regard to a similar situation in Pontiac Motors Division, General Motors Corp., 132 NLRB 413, 415:

> "No impartial arbitrator has ruled in this case. A grievance, carried through Step 2 of a grievance procedure, is hardly a substitute for an arbitration proceeding. The Board may not abdicate its exclusive jurisdiction over unfair labor practices merely because an unlawfully discharged employee has attempted to get his job back by dealing directly with the offending employer."

See also Electric Motors and Specialties, Inc., 149 NLRB 131, 137. Accord: N.L.R.B. v. Tanner Motor Livery, Ltd., 349 F. 2d 1, 3, n. 1 (C.A. 9), affirming on this point 148 NLRB 1402, 1413. Nor is it significant that the Union did not take steps to arbitrate Szczesniak's discharge when Staff Representative Walker repudiated the Step 2 settlement. There is no requirement that the Board "should have

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10/ The contract provides that at Step 2, the Company shall meet with "the Union and the /workmen's/ committee" (G.C. Exh. 2, p. 4). Walker, the Union's staff representative who serviced this contract, testified without contradiction that this meant that he and the three-man employee committee together would meet with the Company (Tr. 70-71, 85-87). It is undisputed that neither Walker nor the third member of the employee committee was notified of, or present at, the purported Step 2 meeting at which Szczesniak's grievance was "settled."

withheld its processes because the charging party . . . had invoked and then abandoned the grievance procedures provided in the collective bargaining agreement between the union and the company." N.L.R.B. v. Thor Power Tool Co., 351 F. 2d 581, 587 (C.A. 7). As this Court said in N.L.R.B. v. Walt Disney Productions, supra, 146 F. 2d at 49:

> "No inference can be drawn . . . that where an unfair labor practice exists, the grievance and arbitration procedures established in a prevailing collective bargaining agreement must be exhausted before the N.L.R.B. will accept jurisdiction over the matter."

Accord: N.L.R.B. v. Huttig Sash & Door Co., Inc., 377 F. 2d 964, 970 (C.A. 8).

III. NO PREJUDICIAL ERROR WAS COMMITTED BY THE ADMISSION INTO EVIDENCE OF BUCKNER'S PRE-HEARING STATEMENT

The record shows that in the course of the investigation into the unfair labor practice charge filed by the Union (G.C. Exh. 1(a)), an agent from the Board's Regional Office, Field Attorney William F. Spannier III, obtained a written sworn statement from F.J. Buckner, petitioner's president and sole stockholder (G.C. Exh. 4). Buckner was interviewed in his office, and he detailed to Spannier the reasons for discharging Szczesniak (Tr. 44-48). The Board agent wrote out the statement in longhand, but Buckner asked him to submit it in typewritten form before he (Buckner) would sign it (Tr. 45). Spannier returned with typed copies of the statement "at some later time," and Buckner then signed it (ibid.).

At the time of the interview, Spannier told Buckner "that he was merely getting information so that when they /the Regional Office/ referred this to Washington . . . there wouldn't be a kickback on the Local Board and . . . they would have sufficient grounds to deny the complaint" (Tr. 46). The Board agent also told Buckner that he (Spannier) had "talked to the Union and had talked to the stewards and, as far as he was concerned, there was no . . . legitimate reason for filing an unfair labor practice charge" (Tr. 47).

On the basis of these facts, petitioner argues that the Court should set aside and refuse to enforce the Board's order because the Board agent, "by making false and misleading statements and promises/,/ caused an inculpatory statement to be made by the accused / i.e., Buckner/" in violation of his Fifth Amendment rights (Br. p. 15); and because the Board agent secured Buckner's statement without advising him "of his constitutional rights as defined in the Miranda case /Miranda v. Arizona, 384 U.S. 436/" (Co. Br. 21).

Those are specious arguments. In the first place, they are all based on the incorrect assumption that Buckner himself is the charged party in this case. The unfair labor practice charge was against an entity called United Engineering Company (R. 3), which is the trade name for F.J. Buckner Corporation, a corporation (R. 4, 7). Buckner himself was not mentioned in the charge, he was not named in the complaint which ultimately issued, he is not bound by the Board's order, except as an officer or agent thereof, and he is not the petitioner before this Court. Hence, no "inculpatory statement was made by the accused," because Buckner was not the accused. Nor did the

Board agent violate F.J. Buckner Corporation's right not to be compelled to testify against itself, because corporations have no such right. See, e.g., United States v. White, 322 U.S. 694. For this reason alone, the arguments made by the Company from page 11 to page 22 of its brief are totally inapposite.

Even assuming that Buckner is the accused in this proceeding, we submit that Field Attorney Spannier did not improperly induce him to make an inculpatory statement. Buckner's story of his interview with Spannier shows merely that Spannier at that time did not believe that he had uncovered any evidence to support the charge that Szczesniak had been discharged for an illegal reason. The thrust of Spannier's remarks, as related by Buckner at the hearing, was that Spannier had interviewed Union officials and the stewards in the plant, and that he, Spannier, had reached the tentative conclusion that the unfair labor practice charge was without merit and that he intended to recommend its dismissal. There is nothing in the record to show that what Spannier told Buckner at the beginning of their interview was not the truth. By no means can it justifiably be said that the statements made by Spannier "were tantamount to promises that the charge would not be prosecuted against Buckner" (Co. Br. 15). Spannier simply told Buckner his view of the merits of the charge; he did not offer to dismiss the charge as the quid pro quo for Buckner's statement. In the language of the Supreme Court in Shotwell Mfg. Co. v. United States, 371 U.S. 341, 348, upon which the Company relies in

its brief (p. 14), there was no "promise of immunity or leniency in return for a statement." 11/

In any event, the Company's defense must fail because, insofar as Labor Board proceedings are concerned, there is no constitutionally protected right to remain silent. An unfair labor practice proceeding is not a criminal case. It is well settled that although the Board has wide discretion in devising remedies, its sanctions may not be punitive but must be limited to measures "which put aright matters the unfair labor practice set awry." Local 60, United Brotherhood of Carpenters v. N.L.R.B., 365 U.S. 651, 658 (Harlan, J., concurring). 12/ Given this limited sanction, it can hardly

11/ Contrast the facts here with those in United States v. Denno, 259 F. Supp. 784 (S.D. N.Y.), which the Company also cites in its brief. There, the court found that a policeman's statements to a person "that the prosecution wanted and needed his help /to convict another person/, that it 'wanted his statement only as a witness,' that 'no charges would be brought against him,' and that 'you will never go to trial in this case' were reasonably understood by petitioner as an assurance that in exchange for his statement as to events attendant upon and incidental to the homicide and assault he would not be prosecuted for any crime arising therefrom" (id., at 790).

12/ Accord: Republic Steel Corp. v. N.L.R.B., 311 U.S. 7, 10 ("The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes."); N.L.R.B. v. Teamsters and Allied Workers, etc., 313 F. 2d 655, 660 (C.A. 9); N.L.R.B. v. Plaskolite, Inc., 309 F. 2d 788, 790 (C.A. 6).

be said that one who admits the commission of unfair labor practices "incriminates" himself.

Moreover, the charged party or respondent in an unfair labor practice case can be compelled by the terms of the Act to testify and give evidence. Congress expressly provided in Section 10(b) that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ." Thus, unlike in a criminal trial, the respondent in an unfair labor practice case can be called to the stand and examined as an adverse witness under Rule 43(b) of the Federal Rules of Civil Procedure. In addition, under the terms of Section 11 of the Act, a charged party in an unfair labor practice case can be subpenaed by counsel for the General Counsel and compelled to give evidence during both the pre-complaint investigation of the charge and the hearing before the Trial Examiner. Refusal to obey the subpena subjects such person to enforcement proceedings in an appropriate district court and failure to obey the order of the district court is specifically declared punishable as contempt.[13/] If Buckner had not voluntarily agreed to give

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13/ Although there is no right to remain silent as to the facts relevant to the unfair labor practice charge, if, during the course of a Board proceeding, a respondent is compelled to testify as to any matter which would subject him to criminal prosecution, he is entitled to immunity from such prosecution. Section 11(3). Nothing of this nature is involved herein.

the Board agent a statement, the latter could have compelled him to do so by subpenaing him. O.T. Link v. N.L.R.B., 330 F. 2d 437, 440 (C.A. 4); N.L.R.B. v. United Aircraft Corp., 200 F. Supp. 48, 50 (D. Conn.), aff'd 300 F. 2d 442 (C.A. 2).[14/]

14/ N.L.R.B. v. Adhesive Products Corp., 258 F. 2d 403 (C.A. 2), upon which the petitioner relies (Br. pp. 12-13), is wholly distinguishable. In that case, the court held that Jencks v. United States, 353 U.S. 657, was applicable to Board proceedings, and that a respondent was entitled, at an unfair labor practice hearing, to see an affidavit that the witness had previously given to the Board, in order to enable the respondent to cross-examine, and possibly to impeach the witness. Underlying the Adhesive Products decision, and the Board's acceptance of that decision in Ra-Rich Mfg. Corp., 121 NLRB 700, is the recognition that a respondent has the undoubted right, inter alia, to cross-examine witnesses who testify adversely to him at an unfair labor practice hearing and to attempt to impeach their credibility. See Jencks v. United States, supra, 353 U.S. at 667, 668-669. A respondent in an unfair labor practice proceeding would be seriously prejudiced by the inability to obtain such pre-trial statements prior to cross-examining such witnesses. Thus, there was reason for applying the doctrine first developed in the criminal law to administrative proceedings. However, as we have demonstrated above, there is no reason for incorporating into unfair labor practice cases the right of a respondent to remain silent, since the Act does not subje him to criminal penalties. The immunity provided by Section 11(3) of the Act is sufficient to protect a respondent's constitutional right

Since Buckner had no constitutional right to remain silent, it follows that his pre-hearing statement was not inadmissible under the rule of Miranda v. Arizona, 384 U.S. 436. That case holds that a statement "obtained from an individual who is subjected to custodial police interrogation" may not be admitted in evidence in a criminal proceeding unless before questioning him the officers inform him of his right not to speak and to consult with counsel. 384 U.S. at 440. That decision rested upon the need to preserve the right of an accused "under the Fifth Amendment . . . not to be compelled to be a witness against himself." Ibid.

Here, as we have already shown, the corporation, not Buckner, was "accused", and Board proceedings are civil, not criminal. Further, Buckner was not held in custody -- he was interviewed in his own office; and Field Attorney Spannier is not a police official. Even if possible criminal sanctions lurked in the background, Buckner's statement would have been admissible since it was freely given in the course of an administrative investigation when the investigator had no reason to foresee the possibility of a criminal proceeding. See Kohatsu v. United States, 351 F. 2d 898 (C.A. 9), cert. denied, 384 U.S. 1011. In any event, there is nothing in the record to show that Spannier did not tell Buckner that the latter had a right to refuse to give a statement and to have an attorney present. The matter simply was not raised at the hearing by the Company, so counsel for the General Counsel was never called upon to establish the point.

One last thing remains to be said about the Company's claim that enforcement of the Board's order should be denied because Buckner's pre-hearing statement was improperly obtained. Even assuming that the

Board agent committed some impropriety in securing Buckner's statement, there is no showing how the Company was prejudiced thereby. The damaging admissions Buckner made in his affidavit were willingly repeated by him and agreed to by the Company's counsel during the course of the hearing before the Trial Examiner. See Tr. 30, 32, 34, 35, 40, 42-43, 49, 53, 55-57. As a result, the evidence contained in the disputed statement is merely cummulative of other evidence in the record, and the Board's findings can be sustained even if the statement is totally disregarded. Under these circumstances, the company has suffered no prejudice and the Board's order is entitled to be enforced as it stands.

IV. THE ALLEGED LOSS OF COMPANY DOCUMENTS BY A BOARD AGENT DOES NOT WARRANT DENYING ENFORCEMENT OF THE BOARD'S ORDER

In its brief (p. 22) petitioner asserts that some documents in a file which it gave to a Board agent while investigating the case were never returned. The Company then claims that the missing papers bore on a "key issue" in the case -- whether Szczesniak filed verbal grievances after the last collective bargaining agreement was entered into -- and that they likely would have changed the Board's finding that he had not. Accordingly, the Company claims that the Board's order should not be enforced because of "the negligent or otherwise unexplained failure" of the Board to produce these documents (Br. p. 24).

This argument, like the ones relating to Buckner's statement, are wholly without substance. The record shows nothing about these alleged "missing papers" except that they pertained to the subject of grievances, they were in Szczesniak's handwriting with notations by Loy, and that the Board agent who purportedly took these documents has no recollection

of them at all (R. 143-146, 246-248). No effort was made at the hearing to disclose any more about the missing papers, and to establish in what way they would be relevant to the case. Petitioner's claim that the missing papers would likely change a key finding by the Board has absolutely no support in the record.[15] Petitioner has the burden of showing in what way it was prejudiced. Mere speculation based on a hypothetical set of facts is not enough. Absent such a showing of prejudice, or that the Board agent was acting in bad faith, there is no justification for denying enforcement of the Board's order. Killian v. United States, 368 U.S. 231, 242; Dwight-Eubank Rambler, Inc. v. N.L.R.B., 380 F. 2d 141, 145 (C.A. 9); N.L.R.B. v. Seine and Line Fishermen's Union, 374 F. 2d 974, 981-982 (C.A. 9), cert. denied, -- U.S. --, 66 LRRM 2370.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied, and that a decree should issue enforcing the Board's order in full.

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15/ Indeed, the missing matters seem to be irrelevant, for they allegedly are written grievances filed by Szczesniak (Tr. 247). Since Szczesniak was discharged ostensibly because his grievances were made orally, rather than in writing, it is not apparent how written grievances filed by him would help the Company's case.

C E R T I F I C A T E

THE UNDERSIGNED CERTIFIES THAT HE HAS EXAMINED THE PROVISIONS OF RULES 18 AND 19 (r 39) OF THIS COURT, AND IN HIS OPINION THE TENDERED BRIEF CONFORMS TO ALL REQUIREMENTS.

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